Supreme Court, U.S.
FILED
04 328 JUL 13 2004
OFFICE OF THE CLERK

No. 04-

In the Supreme Court of the United States

STEPHEN TURNER, M.D., SUSANA TURNER, ON BEHALF OF THEMSELVES AND AS GUARDIAN AD LITEM FOR TWO MINOR CHILDREN, DANIEL TURNER AND DEBORAH TURNER, WESTERN PARAMEDICAL SERVICES, LLC, AND DAVID TURNER,
Petitioners,

v.

DAVID J. COOK, ESQ., COOK PERKISS & LEW, A PROFFESIONAL LAW CORP., AH BENG YEO, AND E. A. MARTINI,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

HERMAN FRANCK, ESQ.
Counsel of Record
LAW OFFICES OF HERMAN FRANCK
926 J STREET, NO. 914
SACRAMENTO, CA 95814
(916) 447-8400

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc.
800.890.5001

QUESTIONS PRESENTED FOR REVIEW

The issues for which review by the United States Supreme Court in the present petition of Writ of Certiorari are:

1. Supreme Court review is necessary to resolve a split within circuit court of appeals decisions on the issue of whether in a RICO cause of action [18 U.S.C. Section 1961], a plaintiff must plead multiple episodes, multiple schemes, and/or multiple victims to make out a claim for relief.

2. Supreme Court review is needed to resolve an issue of exceptional importance as to whether a plaintiff under the federal Fair Debt Collection Practices Act [15 U.S.C. Section 1692, et seq], can maintain a claim thereunder based on collection efforts during the course of an action for fraudulent conveyance of the debtor's family residence to his then spouse.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

I. CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS 1

II. STATEMENT OF THE BASIS FOR JURISDICTION 1

III. STATUTES INVOLVED IN THE CASE 2

IV. STATEMENT OF THE CASE 3

V. SUPREME COURT REVIEW IS NECESSARY TO RESOLVE A SPLIT WITHIN CIRCUIT COURT OF APPEALS DECISIONS ON THE ISSUE OF WHETHER IN A RICO CAUSE OF ACTION [18 U.S.C. SECTION 1961 et seq], A PLAINTIFF MUST PLEAD MULTIPLE EPISODES, MULTIPLE SCHEMES, AND/OR MULTIPLE VICTIMS TO MAKE OUT A CLAIM FOR RELIEF 9

VI. SUPREME COURT REVIEW IS NEEDED TO RESOLVE AN ISSUE OF EXCEPTIONAL IMPORTANCE AS TO WHETHER A PLAINTIFF UNDER THE FEDERAL FAIR DEBT COLLECTION PRACTICES ACT [15 U.S.C. SECTION 1692, ET SEQ], CAN MAINTAIN A CLAIM THEREUNDER BASED ON POST JUDGMENT COLLECTION EFFORTS DURING

THE COURSE OF AN ACTION FOR FRAUDULENT CONVEYANCE OF THE DEBTOR'S FAMILY RESIDENCE TO HIS THEN SPOUSE 13

VII. CONCLUSION 15

LIST OF APPENDICES

Appendix A - Ninth Circuit Order Denying Rehearing *En Banc* - May 4, 2004 . . . . . 1a

Appendix B - Ninth Circuit Opinion - April 1, 2004 . . . . . 3a

Appendix C - District Court Order and Judgment Granting Defendants' Motion to Dismiss - August 28, 2002 . . . . . 25a

Appendix D - District Court Order Granting Defendants' Motion to Dismiss - March 22, 2002 . 43a

TABLE OF AUTHORITIES

Federal Cases:

Bank of America v. Touch Ross & Co., 782 F.2d 966 (11th Cir. 1986) 8, 10

Bass vs. Stolper, Koritzinsky, Brewster & Neider, S.C., 111 F.3d 1322 (1997) 15

Cal. Arch. Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466 (9th Cir. 1987) 8, 9, 10

H.J. Inc.'s v. Northwestern Bell Telephone, Co., 492 U.S. 229 (1989) 7

Medallion Television Enter., Inc. v. Select TV of California, Inc., 833 F.3d 1360 (9th Cir. 1988) 7, 8, 9

Proctor & Gamble v. Big Apple Indus. Bldgs.,Inc., 879 F.2d 10 (2d Cir. 1989) 8, 10, 12

Rags Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985) 8, 10

Sedima v. Imrex, 473 U.S. 479 (1985) 9, 10

Sever v. Alaska Pulp Corp., 978 F.2d 1529 (9th Cir. 1992) 7, 8, 9

Turner v. Cook, 362 F.3d 1219 (9th Cir. 2004) 1, 6, 7, 11

U.S. v. Indelicato, 865 F.2d 1370 (2d Cir. 1989) (*en banc*) 8, 11, 12

Statutes and Rules:

15 U.S.C. Section 1692, et seq 13

15 U.S.C. Section 1692a(5) 2, 7, 8, 13, 14

TABLE OF AUTHORITIES—Continued

15 U.S.C. Section 1692c(b) 5

15 U.S.C. Section 1692e(2)(1)(A) 5

15 U.S.C. Section 1692e(10) 5

16 U.S.C. Section 1692a(5) 7

18 U.S.C. Section 1961 . . . . . 5, 9, 10

18 U.S.C. Section 1961(5) 2

18 U.S.C. Section 1962 3

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1331 3

California's Unfair Competition Act Business & Professions Code 17200 3

F.R.C.P. Rule 12(b)(6) 3, 5

S. Ct. Rule 10(a) 8

S. Ct. Rule 10(c) 9

Petitioners Stephen Turner and Susana Turner, on behalf of themselves and as guardian ad litem for two minor children, Daniel Turner, Deborah Turner, Western Paramedical Services, LLC, and David Turner herewith submit this Petition for *Writ of Certiorari* to the United States Court of Appeals for the Ninth Circuit on appeal from the judgment to the Untied States District Court for the Northern District of California, Honorable Claudia Wilkin, United States District Judge presiding.

I.
CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

The Trial Court's opinion was not reported. *Turner et al v. Cook et al,* United States District Court, Northern District of California, Action No. C01 3884 (August 28, 2002), Hon. Claudia Wilkin, Judge Presiding. (copy reproduced here in the appendix)

The United States Court of Appeals for the Ninth Circuit decision is published, *Turner v. Cook*, 362 F.3d 1219 (9th Cir. 2004) (copy reproduced here in the appendix).

The United States Court of Appeals for the Ninth Circuit further issued an order denying Petitioners Application for *En Banc* review. That order is not published, and is reproduced in the appendix herein.

II.
STATEMENT OF THE BASIS FOR JURISDICTION

The United States Court of Appeals Order and Judgment for which review is sought was entered April 1, 2004.

The United States Court of Appeals Order and Judgment denying petitioner's petition for *en banc* review was issued on May 14, 2004.

Jurisdiction before the United States Supreme Court is based on the court's power to review decisions of the United States Court of Appeals pursuant to 28 U.S.C. Section 1254(1) ("Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree).

III.
STATUTES INVOLVED IN THE CASE

The present case involves the following two federal statutes:

Issue I, regarding the multiple schemes, victims requirement of the RICO act involves 18 U.S.C. Section 1961(5), which provides:

> "Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;"

Issue II, regarding the definition of a debt to bring unlawful conduct within the meaning of the Federal Debt Collection Practices Act is found at 15 U.S.C. Section 1692a(5), which provides:

> The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."

IV.
STATEMENT OF THE CASE

The Ninth Circuit opinion affirmed the Trial Court's dismissal on a motion per F.R.C.P. Rule 12(b)(6) of the present action for violations of the Fair Debt Collection Practices Act, 15 U.S.C. 1692 et seq, ("FDCPA") and RICO, 18 U.S.C. Section 1962.

Jurisdiction before the trial court was based on federal question matter jurisdiction, 28 U.S.C. Section 1331.

Turner and family members sued David Cook and his law office for conduct in connection with a post judgment proceeding on collection of a business tort state court judgment in excess of $1 million. Mr. Cook is a well-known San Francisco based collections attorney. The complaint alleged federal question matter claims of violation of the Fair Debt Collection Practices Act and RICO Act, and a series of supplemental California State Tort Actions for intentional infliction of emotional distress, violations of California's Unfair Competition Act, Business and Professions Code Section 17200, and violation of Stephen Turner's right of privacy under Art. I, Section 1(a) of the California State Constitution.

At issue in the present petition are the federal claims only.

The series of amended complaints detailed the facts of what Mr. Cook did to violate the FDCPA and RICO, including the following:

Following $1,010,000 Judgment (Initial Complaint, Exhibit A), defendants proceeded to post judgment debt collection remedies, which at issue here include a turnover order and a separate state court action for fraudulent conveyance of the residential real property located at 4225 Twilight Court, Hayward, California. A copy of the subject turnover order is attached to the original complaint herein as Exhibit B (attachment to July 11, 2001 letter to Physical Data Services). A copy of the subject fraudulent conveyance action was (Contra Costa County Superior Court Action No. C99-04095) was attached as Exhibit I to the initially filed complaint.

The complaint alleges that Yeo and Martini made a false statement about a turnover order. (FAC 21, 22, 23, 24, 25, 26, 27, 28). This false statement was that the turnover order, according to Yeo and Martini (and through their counsel, Mr. Cook), required debtors of Western Paramedical Services LLC to pay over any sums owing to Western Paramedical Services LLC to Yeo and Martini.

This statement by Cook et al is a complete misstatement of facts, and constitutes a false and misleading communication to third parties in violation of the FDCPA. The true facts are that the turnover Order does not say that debtors of Western Paramedical are to turn over all funds to Yeo & Martini.

Yeo and Martini sent letters out, through Mr. Cook, to hundreds of insurance companies (a partial list is attached to

the initial complaint herein as Exhibit J, and referenced in the FAC at page 16-17, para. 35) doing business with Western Paramedical Services LLC. This created a continuous and repeated series of instances of mailing out false and misleading information through the mails and through faxes, which constitutes the mail and wire fraud as predicate acts under the RICO claim. FAC, RICO Claim, page 26, para. 51; page 27, para. 52; page 28, para. 54)

The conduct in question involves the special specie of fraud on a Court document (by misrepresenting the Turnover Order). This is quite a serious offense for anyone, and especially an Attorney. Under state Criminal law, it is called Attorney Deceit. (FAC Second Claim for Relief, page 27, 53).

These fraudulent statements constitute a violation of the Federal Debt Collection Practices Act, and in particular 15 U.S.C. Section 1692c(b) (concerning communications with third parties), 15 U.S.C. Section 1692e(2)(1)(A) (concerning false representations of the character, amount, or legal status of any debt), and 15 U.S.C. Section 1692e(10) (concerning "the use of any false representation to deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." (FAC, page 15, Para. 32).

The first amended complaint also uses the same facts to plead mail fraud, wire fraud and obstruction of justice as predicate acts supporting a RICO claim under 18 U.S.C. Section 1961 et seq. (FAC, pages 25-31).

The trial court granted defendants motion to dismiss pursuant to Rule 12(b)(6), and entered a judgment of dismissal thereon (see appendix). Petitioners filed a timely appeal before the United States Court of Appeals, Ninth

Circuit. Following briefing and oral argument, the Court affirmed the trial court's judgment in a published opinion. *Turner vs. Cook*, 362 F.3d 1219 (9th Cir. 2004). (copy attached in appendix).

Petitioners sought *en banc* review before the Ninth Circuit, which was denied by the Court on May 14, 2004 (copy of order denying petition for en banc review attached in appendix).

In affirming the judgment, the Court of Appeals found that Mr. Cook's conduct in mailing, faxing, and conducting hundreds of follow up telephone calls constituted a single scheme to collect a debt, and thus did not qualify to state a claim for relief under RICO. *Turner vs. Cook*, 362 F.3d 1219 (9th Cir. 2004) at page 4067-69. In reaching its decision, the court severely diluted the case of *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466 (9th Cir. 1987), which held that multiple criminal episodes with multiple victims are not necessary to state a claim under RICO.

The Court also had to disregard a series of cases from the 2nd, 5th and 11th Circuits to reach the position that the present action involved only one scheme, and thus wasn't actionable.

Finally, the Court determined that a series of more than 100 fraudulent letters, faxes and follow up telephone calls, which transpired over a period of several months and only came to an end because of the present lawsuit, didn't constitute a continuous activity over a substantial period of time.

The District Court and the Court of Appeals ruled that the hundreds of false letters and telephone calls constituted but a

single episode in that they were all pointed to a single scheme to collect a judgment debt. *Turner v. Cook*, 362 F.3d 1219 (9th Cir. 2004) at 4067, and relying on the Court's subsequent holdings in *Medallion Television Enters, Inc. v. Select TV of California, Inc.*, 833 F.3d 1360, 1363-64 (9th Cir. 1988) and *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535-36 (9th Cir. 1992).

The basis of the Trial Court's and Court of Appeals finding was that the single scheme of collecting a debt had a finite endpoint:

> "In the case at bar, appellees alleged actions, like those just mentioned, failed to satisfy *H.J. Inc.'s [v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237-38 (1989)] open-ended continuity requirement since the alleged action were finite in nature in that the mailings, faxes, and telephone calls would cease once appellees collected the outstanding tort judgment against Stephen Turner.

Turner v. Cook, 362 F.3d 1219 (9th Cir. 2004) at page 4068. On the Fair Debt Collection Practices Claim, the court ruled that Turners et al could not make out a claim because the nature of the debt is from an underlying tort judgment, and not a consumer credit transaction as defined in 16 U.S.C. Section 1692a(5). Turner had argued that the subsequent action for fraudulent conveyance, and all the abusive collection efforts done by Mr. Cook during the course of that action, brought the action within the ambit of the FDCPA since the fraudulent conveyance action alleged a transaction of the family home from Dr. Turner to his then wife, Susana Turner.

Such a transaction as alleged by Mr. Cook (that of a transfer of a family residence) plainly sets into the statutory definition of an "obligation . . .of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, . . ." 15 U.S.C. Section 1692a(5)

Pursuant to Supreme Court Rules of Court, Rule 10(a) and (c), Appellants submit the present petition for a writ of certiorari on the RICO question presented herein to bring uniformity in Ninth Circuit case law and the caselaw of the 2nd, 5th, 9th and 11th Circuits, and to settle an exceptionally important issue of law about how many events/schemes are needed to qualify for a RICO case. Compare, *Medallion Television Enters, Inc. v. Select TV of California, Inc.*, 833 F.3d 1360, 1363-64 (9th Cir. 1988) and *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535-36 (9th Cir. 1992) (relied on by the Court of Appeals in this case, and both holding that multiple schemes are required) with the following cases (including one within the Ninth Circuit) that hold multiple schemes are not required under the RICO act: *Cal. Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1469 (9th Cir. 1987), *RAGS Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985), *Bank of America v. Touch Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986) *Proctor & Gamble v. Big Apple Indus. Bldgs. Inc.*, 879 F.2d 10, 16 (2d Cir. 1989) *U.S. v. Indelicato*, 865 F.2d 1370, 1383 (2d Cir. 1989) *(en banc)*

On the FDCPA question presented by this writ, the issue of whether collection efforts accomplished during the course of a fraudulent conveyance claim involving the family residence is within the ambit of the FDCPA constitutes an issue of an important federal law that should be settled by the

Supreme Court pursuant to Supreme Court Rules of Court, Rule 10(c). Petitioner's point out that both the trial courts and Court of Appeals decision on this point do not cite any available caselaw, and none appears to exist.

Accordingly, and for the reasons stated below, the present petition for writ of certiorari should be granted.

V.
SUPREME COURT REVIEW IS NECESSARY TO RESOLVE A SPLIT WITHIN CIRCUIT COURT OF APPEALS DECISIONS ON THE ISSUE OF WHETHER IN A RICO CAUSE OF ACTION [18 U.S.C. SECTION 1961 ET SEQ] A PLAINTIFF MUST PLEAD MULTIPLE SCHEMES, AND/OR MULTIPLE VICTIMS TO MAKE OUT A CLAIM FOR RELIEF

In *Cal. Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 Fd. 2d 1466, 1469 (9th Cir. 1987), the Court holds that single episodes can be actionable under RICO:

> "There was no suggestion that the underlying illegal acts must be part of a different criminal episode. The dictum in *Sedima [(v. Imrex,* 473 U.S. 479 1985)] is suggestive, but without additional explication by the Supreme Court, we decline to follow its lead . . . here, the dealers allege that *Franciscan* made fraudulent sales to them as multiple victims."

The cases relied upon by the District Court and the Court of Appeals were published post *Cal. Arch.*, and include *Medallion Television Enters, Inc. v. Select TV of California, Inc.*, 833 F.3d 1360, 1363-64 (9th Cir. 1988) and *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535-36 (9th Cir. 1992).

These cases severely dilute the *Cal. Arch. Bldg. Prod.* holding to the point of seeming to disavow it. In order to clarify this issue, and to bring uniformity in competing and contradictory Ninth Circuit case law, review is necessary.

Case law in the 2nd, 5th and 11th Circuits confirms Appellants position that multiple episodes or multiple criminal schemes are *not* required for RICO cases. This question is one of exceptional importance since prosecutions of RICO cases in the Ninth Circuit will be substantially impaired by the Court's present ruling.

The examples of the differing positions taken by the 2nd, 5th and 11th Circuits follows.

In *RAGS Couture, Inc. v. Hyatt,* 774 F.2d 1350, 1355 (5th Cir. 1985), the court found that a RICO action was stated on allegations that defendants twice mailed fraudulent invoices on the grounds that the fraudulent invoices were related. Each letter by Mr. Cook is like an invoice, making this case quite instructive.

In *Bank of America v. Touch Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986), the 11th Circuit further clarified this issue by stating:

> "Therefore, under *Sedima*, the District Court's analysis cannot stand. The banks were not required to allege an injury separate from the harm caused by the predicate acts described in section 1961".

Proctor & Gamble v. Big Apple Indus. Bldgs. Inc., 879 F.2d 10, 16 (2d Cir. 1989) further reiterated the rule that multiple schemes are not required:

"We have explicitly eschewed any multiple scheme or episode requirement to demonstrate the continuity of the pattern of racketeering activity. *Indelicato*, 865 F.2d at 1383. Noting that the statutory definition of racketeering activity was cast in terms of 'acts' or 'offenses,' without mention of schemes, episodes or transactions, we concluded that congress did not mean 'to exclude from the reach of RICO multiple acts of racketeering simply because they achieved their objective quickly or because they further but a single scheme.' *Id.* Thus, continuity may be demonstrated in various ways, such as from the nature of the enterprise, as in *Indelicato,* or from the sheer number of predicate acts over several years, or from the number of schemes. As we said in *Beauford*, what is required is that the complaint plead a basis from which it could be inferred that the acts . . . were neither isolated nor sporadic."

The Court should note that the case relied upon by the 2nd Circuit, *U.S. v. Indelicato*, 865 F.2d 1379 (2d Cir. 1989) (*en banc*) was decided en banc, and shows the importance of the issue.

The present case was also determined on the basis that once the present lawsuit was filed, Mr. Cook substituted out of the case, and all further such improper conduct came to a halt. The Court noted that since his conduct occurred over the course of several months, and ended up becoming finite due to his withdrawal of the case, that such conduct did not qualify as continuous. *Turner v. Cook*, 362 F.3d 1219 (9th Cir. 2004) at 4069:

"Because almost all of the alleged fraudulent communications occurred during the two month period

> between June and July of 2001, and the additional three categories of communication occurred only sporadically in the preceding year (and one of these communications was sent to one of the appellants) appellants have failed to allege a "series of related predicates extending over a substantial period of time. Having also failed to allege a threat of "future criminal conduct," appellants have not demonstrated continuity over a closed period."

The court seems to disregard the practical impact of filing a lawsuit challenging Mr. Cook's improper fraudulent activity. Obviously once the lawsuit was filed, the conduct came to a halt. Mr. Cook left the case, and shouldn't be insulated from liability because he got caught at what he was doing. This would be like indicting a mafia family, only to have them claim innocence from RICO because they immediately disbanded from their illegal conduct.

This position of the court in this case quite clearly departs from the wisdom of the en banc decision in *U.S. v. Indelicato*, 865 F.2d 1379 and *Proctor & Gamble*, quoted above ("we concluded that congress did not mean 'to exclude from the reach of RICO multiple acts of racketeering simply because they achieved their objective quickly or because they further but a single scheme.' *Id.* Thus, continuity may be demonstrated in various ways, such as from the nature of the enterprise, as in *Indelicato,* or from the sheer number of predicate acts over several years, or from the number of schemes.")

Since these issues are quite controversial, are contradicted by a series of three circuits, and have justified en banc review in the 2nd circuit, this court should grant the present petition for writ of certiorari.

VI.
SUPREME COURT REVIEW IS NEEDED TO RESOLVE AN ISSUE OF EXCEPTIONAL IMPORTANCE AS TO WHETHER A PLAINTIFF UNDER THE FEDERAL FAIR DEBT COLLECTION PRACTICES ACT [15 U.S.C. SECTION 1692, ET SEQ], CAN MAINTAIN A CLAIM THEREUNDER BASED ON COLLECTION EFFORTS DURING THE COURSE OF AN ACTION FOR FRAUDULENT CONVEYANCE OF THE DEBTOR'S FAMILY RESIDENCE TO HIS THEN SPOUSE

The trial court and court of appeals ruled that to have standing under the Fair Debt Collection Practices Act [15 U.S.C. Section 1692 et seq, and in particular, [15 U.S.C. Section 15 U.S.C. Section 1692a(5), quoted above] requires that the underlying transaction be a credit transaction for personal consumer and family household items. Commercial obligations are exempt. Turner's underlying judgment for which collection was sought was not in the category of a personal credit transaction. It was a business tort judgment. However, a new claim and new collection effort arose when the Cook Firm took over, when a 1998 action for fraudulent conveyance of the family home was filed and prosecuted. It was during the course of the fraudulent conveyance action that the various violations of the Fair Debt Collection Practices Act arose.

Defendant alleged false mass mailings, wrongfully misstating the extent, nature, and status of a court order, defrauding others into thinking that the existing court order required debtors to Western Paramedical to pay over any debt payments to the Cook Law Firm (when in fact no such order so stated). The calling of Turner bad names ("You dirty Jew; I'll take everything away from you"), a false trial of an

interpleader claim, and other duplicative, repetitious, and improper falsities and use of procedures (e.g. filing three fraudulent conveyance actions, one in Martinez (Contra Costa County), one in Hayward (Alameda County), and a second one in Hayward (Alameda County), and other violations detailed in the complaint.

Petitioners have no quibble with the rule that says standing under the federal Fair Debt Collection Practices Act requires a showing of a consumer credit transaction. Plaintiffs argued that the fraudulent conveyance action fit the statutory definition of a consumer credit transaction, since the fraudulent conveyance action alleged a transaction in the family home, from Stephen Turner to his then wife, Susana Turner. (The parties have since obtained a divorce judgment.)

Petitioners rely on the plain language of the federal statute for this proposition, the statute provides: 15 USC Section 1692a(5), which provides:

> The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."

The fraudulent conveyance action involved in this matter alleges a transaction in a family home which then gave rise to Mr. Cook's vigorous and over the line collection activities. Of special note is neither the Ninth Circuit nor the Trial Court could cite any case law supporting a proposition that a fraudulent conveyance action would not qualify as a consumer

credit transaction under the Fair Debt Collection Practices Act. Petitioners point out the general rule that remedial statutes such as the FDCPA are to be read liberally and not constrictively, as the Seventh Circuit showed in the case of *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1325 (broad reading of the definition of a debt includes a payment obligation which arose from a dishonored check. "as long as the transaction creates an obligation to pay, a debt is created.")

Where a type of obligation arises from conduct that fairly comes into the plain meaning of the statute, the action ought to be permitted. Since these fraudulent conveyance actions are becoming more common, and since debt collection practices law has been silent on this issue, the United States Supreme Court should grant review here to settle the issue once and for all. Accordingly the present petition for writ of certiorari should be granted.

VII.
CONCLUSION

Based on the forgoing, the Petition for writ of certiorari should be granted.

Respectfully submitted,

HERMAN FRANCK, ESQ. (SB#123476)
Counsel of Record

Attorney for Petitioners:
Stephen Turner, M.D., Susana Turner
Daniel Turner and Deborah Turner
Western Paramedical Services, LLC
David Turner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-16847

[Filed May 4, 2004]

STEPHEN TURNER, M.D., SUSANA TURNER, on behalf of themselves and As Guardian Ad Litem for minor children DAVID TURNER DANIEL TURNER & DEBORAH TURNER; WESTERN PARAMEDICAL SERVICES, LLC,
Plaintiffs-Appellants,

v.

DAVID J. COOK; COOK PERKISS & LEW, a PROFESSIONAL LAW CORP.; AH BENG YEO; E.A. MARTINI,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
D.C. No. CV-01-03884-CW
Claudia Wilkin, District Judge, Presiding

Before: B. Fletcher, Tashima, Circuit Judges, and Pollak,* SeniorDistrict Judge

ORDER

Judge Tashima votes to deny the petition for rehearing en banc and Judges Fletcher and Pollak so recommend. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed R. App. P. 35(f).

The petition for rehearing en banc is denied.

---

* Honorable Louis H. Pollak, Senior United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-16847

[Filed April 1, 2004]

STEPHEN TURNER, M.D., SUSANA TURNER, on behalf of themselves and As Guardian Ad Litem for two minor children DANIEL TURNER AND DEBORAH TURNER, WESTERN PARAMEDICAL SERVICES, LLC, AND DAVID TURNER,
Plaintiffs-Appellants,

v.

DAVID J. COOK, ESQ., COOK PERKISS & LEW, a PROFESSIONAL LAW CORP., AH BENG YEO and E.A. MARTINI,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
D.C. No. CV-01-03884-CW
Claudia Wilkin, District Judge, Presiding

Before: Betty B. Fletcher and A. Wallace Tashima, Circuit Judges, and Louis H. Pollak,* District Judge

OPINION

POLLAK, District Judge:

In this suit initiated in the District Court for the Northern District of California and arising under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o ("FDCPA"), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), to which were annexed certain supplemental state-law claims, the plaintiffs-appellants are Stephen Turner; his wife, Susana Turner; the Turner children, Daniel, Deborah and David; and Western Paramedical Services, LLC ("WPS"), an entity that employed the Turners.[1] The defendants-appellees are Ah Beng Yeo, E.A. Martini, David J. Cook, and Cook, Perkiss & Lew, a law firm in which Cook is a partner. The plaintiffs-appellants' federal claims are that actions taken by Yeo and Martini, represented by Cook, to levy execution on an antecedent state-court tort judgment in favor of Yeo and Martini and against Stephen Turner, contravened the FDCPA and RICO. The actions of appellees of which appellants complained included pursuing a fraudulent conveyance action

---

* Honorable Louis H. Pollak, Senior United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] According to appellants' pleadings, WPS was owned by the Golden Gate Trust, a family trust of which the Turner children were beneficiaries. Stephen Turner, a physician, provided medical services to WPS and Susana Turner was WPS' general manager. WPS did not join in the FDCPA cause of action.

against Stephen Turner in a California state court and communicating with numerous insurance companies in order to accelerate the collection process.

From District Court orders sequentially dismissing the FDCPA and RICO claims (and, with them, the supplemental state-law claims), plaintiffs-appellants appeal. We affirm.

Background

On August 21, 1998, after a jury trial in the Superior Court for Contra Costa County, in California, appellees Yeo and Martini obtained a judgment against Stephen Turner for more than $1,000,000. According to appellants' First Amended Complaint in the District Court, "the judgment arose from allegations of various business interference torts by Stephen Turner against Yeo and Martini." Yeo and Martini retained Cook and his law firm Cook, Perkiss & Lew to assist in collection of the judgment — assistance which appears to have continued until March, 2002.[2] On October 29, 1999, Cook filed a complaint in the Superior Court for Contra Costa County on behalf of Yeo and Martini against Stephen Turner, alleging that Turner, under the express direction of Susana Turner, had fraudulently conveyed his real and personal property, including his home, to a family limited partnership and a limited liability company, each allegedly controlled by the Turners, with the intent to prevent Yeo and Martini from collecting the money owed on the August 21, 1998 judgment.

---

[2] According to appellants' pleadings, Cook, Perkiss & Lew "substituted out" as attorneys for Yeo and Martini sometime around March, 2002.

On October 15, 2001, in response to the Yeo-Martini fraudulent conveyance action, Stephen and Susana Turner, suing for themselves and on behalf of their children, filed this action in the United States District Court for the Northern District of California, claiming violations of the FDCPA and various state laws. Subsequently an amended complaint was filed, which included all of the allegations in the original complaint and added RICO claims. The amended complaint included WPS as a plaintiff on the RICO claims and on a California Unfair Competition Act claim. WPS was not a plaintiff on the FDCPA claim or on the state-law claims other than the Unfair Competition Act claim.

The First Amended Complaint

In their FDCPA claims, the Turners alleged that appellees, as part of their efforts to collect on the state-court judgment, dispatched false and misleading communications — by mail, fax and telephone — to numerous insurance companies thought to be debtors of WPS, in violation of 15 U.S.C. §§ 1692c(b), 1692e(2)(A), 1692e(3), 1692e(9), 1692f(1).[3] According to the Turners, these communications

---

[3] Section 1692c(b) states that, without prior consent, "a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector."

Section 1692e prohibits the debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt[.]" and outlines conduct constituting a violation of the section. Such conduct includes the false representation of "the character, amount, or legal status of any

falsely represented that the Superior Court for Contra Costa County had ordered all "accounts, accounts receivable, and other rights . . . generated by Stephen Turner, or any entity of [sic] his behalf," including WPS, to be turned over to Yeo and Martini. The Turners asserted that because WPS was not owned, operated or controlled by Stephen Turner, the Superior Court's order applied only to Stephen Turner and not to WPS. The Turners also claimed that appellees' fraudulent conveyance filings in the Superior Court contained "false, deceptive and improper statements." Specifically, the Turners objected to (1) references to Stephen Turner's prior misdemeanor criminal conviction and (2) a characterization of a Turner family trust — the Golden Gate Trust — suggesting that it was a "collusive trust" created to assist Stephen Turner in hiding his assets. The Turners also alleged that appellees engaged in conduct to "harass, oppress or abuse" them, in violation of 15 U.S.C. § 1692d[4] and § 1692f(6).[5] This alleged

---

debt[.]" 15 U.S.C. § 1692e(2)(A), and "[t]he use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval[,]" *id.* § 1692e(9).

Section 1692f prohibits the use of "unfair or unconscionble means to collect" a debt, including, pursuant to § 1692f(1), the collection of monies that are not "expressly authorized by the agreement creating the debt or permitted by law."

[4] Section 1692d states that a "debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."

[5] Section 1692f(6) prohibits the "[t]aking or threatening to take any non-judicial action to effect dispossession or disablement of

conduct included (1) serving excessive copies of court papers on the Turners; (2) improperly serving them with documents intended for other parties, such as a Nevada limited liability company; (3) making false statements in an August, 2001 court filing regarding the sale of appellants' residence; and (4) Cook's statement to Stephen Turner that: "You dirty Jew, I'll take everything away from you."

In their RICO claims, the Turners, now joined by WPS, charged appellees with violating 18 U.S.C. § 1962(c),[6] which prohibits a person from participating, "through a pattern of racketeering activity," in the conduct of the affairs of an "enterprise" whose activities affect interstate commerce, and 18 U.S.C. § 1962(d),[7] which prohibits conspiring to violate any of the three antecedent provisions of § 1962. The "enterprise," according to appellants' allegations, was Cook's law firm. The alleged "racketeering activity" involved the same mail, fax and telephone communications attributed to Cook's law firm in the Turners' FDCPA claims. This "racketeering activity," according to appellants, had been

---

property" if there is no present right to possession of the property, there is no present intention to take possession of the property, or the property is exempt by law from dispossession.

[6] Section 1962(c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

[7] Section 1962(d) adds: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

"continuous since the filing of the subject turnover order (dated July 18, 2000[)], through the present," and resulted in the "loss of money" for WPS, the loss of the "prospective economic advantage of developing the fledgling business of [WPS] into a viable business entity" for Stephen and Susana Turner, and the Turners' loss of "the prospects of continued and lucrative employment with [WPS]."

The District Court, in an order issued March 22, 2002, dismissed the FDCPA portions of the amended complaint on the grounds that the debt in question — the tort judgment — was not subject to the FDCPA. The District Court also dismissed appellants' RICO claims for failing to satisfy RICO's continuity requirement, but granted appellants leave to file "an Amended Complaint alleging a RICO violation."

The Second Amended Complaint

On April 22, 2002, the Turners and WPS filed a Second Amended Complaint in which they expanded upon their earlier RICO claims. In this complaint appellants alleged that appellees had sent out "hundreds" of letters and facsimiles to third-party insurance companies misrepresenting the substance of the Superior Court order — an activity that amounted to a continuous "pattern of related, non sporadic repetitious and highly numbered incidents . . . of . . . illegal racketeering conduct" in violation of 18 U.S.C. §§ 1962(c) and (d). Each time appellees engaged in this activity, appellants maintained, appellees committed an act of mail or wire fraud that was intended to "snare the continual billing activities of [WPS] by having [these] insurance companies divert payments wave after wave." Beside the economic loss appellees' allegedly fraudulent conduct caused WPS, appellants contended that appellees' conduct would have negative economic consequences for Stephen and Susana Turner because the

Turners had "both lost the business expectancy of a good employment relationship with [WPS]," and would not receive their salaries if WPS suffered financial harm. Appellants maintained that the Turner children would also be harmed, since the children were the ultimate beneficiaries of the Golden Gate Trust, the Turner family trust which owned WPS.[8]

Appellants also alleged that:

> approximately [in] March, 2002, Cook and Cook, Perkiss & Lew substituted out as counsel of record on the fraudulent conveyance and other actions, and thus the racketeering activity is 'closed end' and is not expected to repeat. However, when it was going on, it was open ended and was never expected to stop, because Turner is in fact judgment proof, and as long as the judgment remains unpaid and Cook is on the case, these sort[s] of improper mailings etc[.] would be mailed out. It was the filing of the present lawsuit that caused Cook and Cook, Perkiss and Lew to withdraw of [sic] the cases, and thus shifted the activity to closed end.

On August 28, 2002, the District Court dismissed the Second Amended Complaint, concluding that appellants had failed to allege any threat of continuing illegal activity, which

---

[8] *See* footnote 1, *supra*. In their Second Amended Complaint, appellants asserted that, in addition to themselves, there were other victims of appellees' fraudulent activities. These alleged additional victims included American Paramedical Services, a New Jersey LLC managed by Stephen Turner's sister; Robert Matthews, who had provided financial services to Stephen Turner; and the insurance companies that received Cook's communications.

is required to establish a pattern of racketeering under RICO. The court dismissed without prejudice appellants' state-law claims, and entered final judgment against appellants. Appellants timely filed their appeal on September 20, 2002. This court has jurisdiction under 28 U.S.C. § 1291.

Standard of Review

A judgment dismissing a case on the pleadings is reviewed on appeal *de novo*. *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1167 (9th Cir. 2002). The appellate court must "accept all material allegations in the complaint as true and construe them in the light most favorable to [the non-moving party]." *NL Industries, Inc. v. Kaplan* 792 F.2d 896, 898 (9th Cir. 1986). A dismissal may be affirmed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)).

Standing of plaintiff-appellant Stephen Turner to pursue this appeal

Because Stephen Turner has filed for bankruptcy in the United States Bankruptcy Court, Northern District of California, he is no longer a real party in interest in this matter and has no standing to pursue this appeal. When Turner declared bankruptcy, all the "legal or equitable interests" he had in his property became the property of the bankruptcy estate and are represented by the bankruptcy trustee. *See* 11 U.S.C. § 541(a)(1). Causes of action are among such legal or equitable interests. *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 707 (9th Cir. 1986).

The trustee in Turner's bankruptcy case has, in a letter to Turner's counsel, indicated his willingness to allow Turner to proceed with his appeal. However, the letter, the pertinent text of which is set forth in the margin,[9] is insufficient to confer authority on Turner's counsel to prosecute this appeal because it fails to effectuate an actual abandonment of the trustee's interest in Stephen Turner's causes of action — to the contrary, the letter contemplates the estate's pursuit of these causes of action "in the event that," via this appeal, "the dismissal is overturned." Section 554 of title 11 of the United States Code requires notice and a hearing for abandonment to occur, and Bankruptcy Rule 6007 requires the trustee to give notice of a proposed abandonment to all creditors. Nothing in the record indicates that these steps have occurred. Accordingly, since we conclude that Stephen Turner has no standing to bring this appeal, the appeal is dismissed as to him.[10] However, we do reach the merits of the appeal as to

---

[9] The letter from the attorney for the trustee states: "The Trustee's position is that since the matter has been briefed and argued, the parties should allow the Court to rule on the appeal. In the event that the judgment is affirmed, there is nothing remaining for the estate to administer. In the event that the dismissal is overturned, then the estate will have a claim against the various defendants and will proceed accordingly."

[10] Turner relies on Bankruptcy Rule 6009, which states, "[w]ith or without court approval, the trustee or debtor in possession may prosecute . . . any pending action . . ." However, because a trustee has been appointed, Turner is not a debtor in possession, and thus, cannot prosecute this action. ("'Debtor in possession' means debtor except when a person that has qualified under § 322 of this title is serving as trustee in the case." 11 U.S.C. § 1101.).

the other appellants.[11]

Discussion

FDCPA

In enacting the FDCPA, Congress sought to counter the abusive, deceptive and unfair debt collection practices sometimes used by debt collectors against consumers. *See* 15

---

[11] In *Dunmore v. United States*, 2004 U.S. App. LEXIS 1328, 2004 WL 177856, *4 (9th Cir. Jan. 29, 2004), this court recognized that if a bankruptcy petitioner were to make an "understandable" mistake in suing in his own name, he could proceed under Fed. R. Civ. P. 17(a) if the real party in interest were to ratify his actions. During a bankruptcy proceeding, Dunmore, the petitioner, secured the bankruptcy trustee's abandonment of his three tax refund claims. Accordingly, we concluded: "We assume without deciding that when the bankruptcy trustee abandoned the refund claims in February 1999, the abandonment could constitute the estate's ratification of Dunmore's lawsuit." *Id.* In the instant matter there has been no trustee abandonment.

U.S.C. § 1692.[12] The Act allows aggrieved parties to recover damages, attorney's fees and costs. *Id.* § 1692k(a). Because not all obligations to pay are considered debts under the FDCPA, a threshold issue in a suit brought under the Act is whether or not the dispute involves a "debt" within the meaning of the statute. *Slenk v. Transworld Sys., Inc.*, 236 F.3d 1072, 1075 (9th Cir. 2001). The FDCPA defines debt as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes . . ." 15 U.S.C. § 1692a(5); *see also Bloom v. I.C. Sys. Inc.*, 972 F.2d 1067, 1068-69 (9th Cir. 1992) (explaining that the FDCPA applies to debts incurred for personal rather than commercial reasons). The Act defines "consumer" as "any natural person obligated . . . to pay any debt." *Id.* § 1692a(3). The Act does not define "transaction," but the consensus judicial interpretation is reflected in the Seventh Circuit's ruling that the statute is limited in its reach "to those obligations to pay arising from consensual transactions, where parties negotiate or contract for consumer-related goods or services." *Bass v. Stolper, Koritzinsky, Brewster & Neider,*

---

[12] "There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). "Existing laws and procedures for redressing these injuries are inadequate to protect consumers." *Id.* § 1692(b). "Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts." *Id.* § 1692(c). "It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." *Id.* § 1692(e).

S.C., 111 F.3d 1322, 1326 (7th Cir. 1997) (citing *Shorts v. Palmer*, 155 F.R.D. 172, 175-76 (S.D. Ohio 1994) (obligation to pay for shoplifted merchandise not a "debt" under the FDCPA because "plaintiff has never had a contractual arrangement of any kind with any of the defendants.")); *see also Mabe v. G.C. Servs. Ltd. P'ship*, 32 F.3d 86, 88 (4th Cir. 1994) (obligation to pay child support not a "debt" under the FDCPA because it was not incurred in exchange for consumer goods or services).

This court has not heretofore had occasion to address the question of whether a tort judgment resulting from business-related conduct qualifies as a debt under the FDCPA. However, the Eleventh Circuit in *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367 (11th Cir. 1998), ruled on a similar issue and concluded that a tort judgment does not constitute a debt, and, therefore, that the FDCPA does not apply. In *Hawthorne*, the plaintiff was in an accident, allegedly resulting from her negligence, for which the defendant had been assigned subrogation rights. *Id.* at 1369. After the defendant attempted to collect its claim, the plaintiff sued under the FDCPA. *Id.* The district court ruled in the defendant's favor, concluding that the obligation at issue did not constitute a "debt" under the FDCPA, and the Eleventh Circuit affirmed. *Id.* at 1369-70.

The core of the appellate ruling in *Hawthorne* was as follows:

> By the plain terms of the statute, not all obligations to pay are considered "debts" subject to the FDCPA. Rather, the FDCPA may be triggered only when an obligation to pay arises out of a specified "transaction." Although the statute does not define the term "transaction," we do not find it ambiguous. A

> fundamental canon of statutory construction directs us to interpret words according to their ordinary meaning. The ordinary meaning of "transaction" necessarily implies some type of business dealing between parties. In other words, when we speak of "transactions," we refer to consensual or contractual arrangements, not damage obligations thrust upon one as a result of no more than her own negligence. While we do not hold that every consensual or business dealing constitutes a "transaction" triggering application of the FDCPA . . . at a minimum, a "transaction" under the FDCPA must involve some kind of business dealing or other consensual obligation. Because [appellant's] alleged obligation to pay [appellee] for damages arising out of an accident does not arise out of any consensual or business dealing, plainly it does not constitute a "transaction" under the FDCPA.[13]

Hawthorne, 140 F.3d at 1371 (internal citations omitted).

We agree with this well-reasoned Eleventh Circuit opinion, and we conclude that the District Court did not err in dismissing the FDCPA claims. Appellees brought the fraudulent conveyance action against Stephen Turner[14] in an

---

[13] Some years earlier, the Third Circuit, in *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1168 (3d Cir. 1987), reached a similar conclusion, observing that "nothing in the [FDCPA] or the legislative history leads us to believe that Congress intended to equate asserted tort liability with asserted consumer debt."

[14] The fraudulent conveyance action listed as defendants Stephen Turner individually and doing business as Insurance Medical Expert, aka California Paramedical Services, aka

effort to collect a tort judgment. According to appellants' own pleadings, that judgment resulted from alleged business interference torts, not any consumer transaction. *See Hawthorne*, 140 F.3d at 1371 ("[A]t a minimum, a 'transaction' under the FDCPA must involve some kind of business dealing or other consensual obligation."); *Bass*, 111 F.3d at 1326; *see also* Bloom, 972 F.2d at 1068-69 (FDCPA does not apply to debts incurred for commercial reasons). Appellants maintain that the FDCPA should apply because the "fraudulent conveyance action isn't based on an underlying business tort judgment, but instead involved allegations that the transfer of a personal residence from Stephen Turner and other entities to Susana Turner was to defraud creditors." However, as the District Court correctly concluded, appellees' efforts are not converted into an attempt to collect a consumer debt merely because the fraudulent conveyance action involved Stephen Turner's home.

Turner's underlying "obligation" to pay Yeo and Martini does not arise out of a consumer transaction, and hence is not a "debt" within the meaning of the FDCPA. We therefore hold that the FDCPA does not apply to appellees' efforts to collect the damages awarded for Stephen Turner's commercial torts. Hence, the District Court properly concluded that the FDCPA does not apply.[15]

Worldwide Health Services; Stephen B. Turner Family Trust; Real Investment Capital Holdings, LLC; and unnamed individuals.

[15] In affirming this 12(b) dismissal, we do not suggest that any of appellants' allegations of fraud would be sustained at trial.

RICO

Civil liability under RICO is premised on violations of one or more of the provisions of § 1962. The provisions at issue here are 18 U.S.C. §§ 1962(c) and 1962(d). Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1962(d) states: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

Because appellants contended that appellees engaged in "a pattern of racketeering activity," not "collection of unlawful debt," appellants' complaint must allege (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *See Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 191 (9th Cir. 1987).

As previously described, the "racketeering activity" appellants complained of consisted of representations by appellees in mail, fax and telephone communications to various insurance companies believed to be debtors of plaintiff WPS, that the Superior Court for Contra Costa County had ordered any monies owed to WPS to be turned over to appellees. Appellants contended that the Superior Court's turnover order only applied to Stephen Turner; that WPS was not owned, operated or controlled by Stephen

Turner; and, therefore, that the Superior Court did not order that monies owed to WPS be turned over to appellees. Appellants maintained that each time appellees misrepresented the substance of the turnover order, they committed an act of mail or wire fraud and of obstruction of justice. The alleged "enterprise" through which this "racketeering activity" was said to have been carried out was, as previously noted, the law firm of Cook, Perkiss & Lew. The District Court dismissed appellants' RICO claim, ruling that appellants had failed adequately to allege that appellees' conduct constituted a "pattern of racketeering activity." Whether the District Court ruled correctly is the question now to be addressed.

"[R]acketeering activity" is any act indictable under several provisions of Title 18 of the United States Code, and includes the predicate acts of mail fraud, wire fraud and obstruction of justice, each of which is alleged in this case. *See* 18 U.S.C. § 1961(1) (identifying § 1341 (mail fraud), § 1343 (wire fraud) and § 1503 (obstruction of justice) as predicate acts under RICO). In order to constitute a "pattern," there must be at least two acts of racketeering activity within ten years of one another. 18 U.S.C. § 1961(5). However, while two predicate acts are required under the Act, they are not necessarily sufficient. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237-38, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)). A "pattern" of racketeering activity also requires proof that the racketeering predicates are related and "that they amount to or pose a threat of continued criminal activity." *Id.* at 239. Evidence of multiple schemes is not required to show a threat of continued criminal activity, *id.* at 240, and, indeed, proof of a single scheme can be sufficient so long as the predicate acts involved are not isolated or sporadic. *Sun Sav.*, 825 F.2d

at 193, 194. The Supreme Court, in *H.J. Inc.*, 492 U.S. at 241, expounded on RICO's continuity requirement, stating:

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. . . . A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement[.]

Thus, in order to allege open-ended continuity, a RICO plaintiff must charge a form of predicate misconduct that "by its nature projects into the future with a threat of repetition." *See Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 366 (9th Cir. 1992); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535-36 (9th Cir. 1992); *Medallion Television Enters., Inc. v. SelecTV of Cal., Inc.* 833 F.2d 1360, 1363-64 (9th Cir. 1988) (discussed *infra*). Conversely, an alleged "series of related predicates" not "extending over a substantial period of time" and not "threatening . . . future criminal conduct" fails to charge closed-ended continuity. *See Howard v. America Online, Inc.*, 208 F.3d 741, 750 (9th Cir. 2000); *Religious Tech. Ctr.*, 971 F.2d at 366; *River City Mkts., Inc. v. Fleming Foods West, Inc.*, 960 F.2d 1458, 1464 (9th Cir. 1992).

Appellants contend that the District Court erred in dismissing their RICO claims for failure to allege a continuing pattern of racketeering activity. They argue that their allegations that appellees had engaged in a "continuous pattern of mailing hundreds of fraudulent letters" satisfied RICO's continuity requirement, and, therefore, adequately

alleged a "pattern of racketeering activity." They cite our decision in *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466 (9th Cir. 1987), as support for this proposition.

In *California Architectural*, the defendant-appellee contended that the alleged predicate acts did not satisfy RICO's continuity requirement because the predicate acts all related to a single criminal episode. 818 F.2d at 1469. We disagreed with this contention, finding that multiple criminal episodes are not required to establish a pattern of racketeering under RICO. *Id.* Appellants in the case at bar argue that the District Court's decision was in error in light of *California Architectural*. We disagree. The District Court acknowledged that appellants "need not plead multiple 'criminal episodes' in order to state a RICO claim." However, because appellants had alleged only a single scheme, the District Court required confirmation that the criminal activity would continue. The court concluded that appellants' pleadings failed to provide such confirmation because appellees' activities were destined to end once the collection of the tort judgment was complete.

The District Court canvassed a number of other decisions of this court — decisions subsequent to *California Architectural*. Thus, the District Court relied on *Medallion*, in which, in sustaining a grant of summary judgment against RICO plaintiffs, we said:

> Continuity does not require a showing that the defendants engaged in more than one "scheme" or "criminal episode." The circumstances of the case, however, must suggest that the predicate acts are indicative of a threat of continuing activity. Here, that threat is absent. . . . In essence, Medallion's allegations concern a single fraudulent inducement to

> enter a contract. Once the joint venture had acquired the broadcast rights, the fraud, if indeed it was a fraud, was complete.

833 F.2d at 1363-64 (internal citations and footnote omitted). Similarly, the District Court looked to *Religious Technology Center*, in which, in sustaining dismissal of certain RICO defendants, we held that, "[s]ince the only goal of the Greene defendants was the successful prosecution of the *Wollersheim* state tort suit, there was no threat of activity continuing beyond the conclusion of that suit." 971 F.2d at 366.[16]

In the case at bar, appellees' alleged actions, like those just mentioned, failed to satisfy *H.J. Inc.*'s open-ended continuity requirement since the alleged actions were finite in nature in that the mailings, faxes and telephone calls would cease once appellees collected the outstanding tort judgment against Stephen Turner. Indeed, in their Second Amended Complaint, filed on April 22, 2002, appellants acknowledged that "the racketeering activity [was] 'closed-end' and [was] not expected to repeat," unless "the judgment remaineded unpaid and Cook [continued] on the case." Cook's firm had withdrawn from this case in March, 2002.

Moreover, appellants' allegations failed to satisfy *H.J. Inc.*'s closed-ended continuity requirement. In their Second Amended Complaint appellants list 94 companies that, according to appellants, received appellees' alleged fraudulent communications in June or July of 2001, and some of which may have received follow-up calls to these communications at an unspecified time. Besides these 94 communications,

---

[16] The District Court also relied on *Sever*, which, in discussing continuity, followed *Medallion*. 978 F.2d at 1535-36.

appellants only specifically alleged three additional fraudulent communications by appellees. These alleged communications included (1) a letter sent to Travelers Insurance Company on August 4, 2000 (attached to Original Complaint at Exhibit C); (2) a letter "sent by Defendants during September 20, 2000 to a third party" — that third party being appellant WPS (attached to Original Complaint at Exhibit E); and (3) letters, faxes and telephone discussions with the paramedical services company AMSA from December 2000-February 2001 (items which appellants failed to allege or document with any specificity). Because almost all of the alleged fraudulent communications occurred during the two month period between June and July of 2001, and the additional three categories of communication occurred only sporadically in the preceding year (and one of these communications was sent to one of the appellants) appellants have failed to allege a "series of related predicates extending over a substantial period of time." Having also failed to allege a threat of "future criminal conduct," appellants have not demonstrated continuity over a closed period.

Thus, having failed to aver that the alleged acts of mail fraud, wire fraud and obstruction of justice had the requisite continuity, appellants did not sufficiently allege a "pattern of racketeering activity." Accordingly, the District Court properly dismissed appellants' RICO claims.[17]

---

[17] Because appellants failed to allege the requisite substantive elements of a RICO claim under 18 U.S.C. § 1962(c), appellants' claim under 18 U.S.C. § 1962(d), which makes it "unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section," also fails.

Conclusion

The dismissal of the FDCPA claims and the RICO claims was proper. Accordingly, the judgment of the District Court is affirmed.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 01-3884 CW

[Filed August 28, 2002]

STEPHEN TURNER, M.D., SUSANA TURNER, on behalf of themselves and as Guardian ad Litem for minor children DAVID TURNER, DANIEL TURNER, DEBORAH TURNER, and WESTERN PARAMEDICAL SERVICES, LLC,
Plaintiffs,

v.

DAVID J. COOK, ESQ., COOK, PERKISS & LEW, a professional law corporation, AH BENG YEO and E.A. MARTINI, and DOES 1 THROUGH X AND EACH OF THEM INCLUSIVE,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss Plaintiffs' Second Amended Complaint. Plaintiffs' First Amended Complaint alleged

violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692; the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961; and several State law claims. On March 22, 2002, the Court dismissed that complaint with leave to amend. Order Granting Defendants' Motion to Dismiss (March 22 Order). In this Complaint, Plaintiffs have amended their RICO claim and continue to pursue a State law claim for invasion of privacy. Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants move to dismiss these two remaining claims. Plaintiffs oppose the motion. The matter was submitted without oral argument. Having considered all the papers filed by the parties, the Court grants the motion (Docket # 50).

BACKGROUND

The facts of this case were discussed in the Court's March 22 Order. They will be recounted here only as necessary to resolve the issues in dispute.

On August 21, 1998, Defendants Yeo and Martini obtained a judgment against Plaintiff Stephen Turner in excess of $1,000,000. The judgment resulted from a jury verdict after trial in which Plaintiff Stephen Turner was found to have committed "various business interference torts" against Defendants Yeo and Martini. Defendants Yeo and Martini hired Defendant Cook and his law firm, Cook, Perkiss, and Lew, to assist in collection of the judgment. Plaintiffs allege that the means used by Defendants in their effort to collect on the judgment violated RICO and constituted an invasion of privacy.

In support of their RICO claim, Plaintiffs allege ninety-four separate incidents of fraud. The alleged fraud consists of stating that a State court had ordered that any monies owed to

Plaintiff Western Paramedical Services (WPS) should be turned over to Defendants. Plaintiffs contend that the turnover order, in fact, only applied to Stephen Turner, that WPS is not owned, operated or controlled by Plaintiff Stephen Turner, and, therefore, the State court did not order that monies owed to WPS be turned over to Defendants. Plaintiffs contend that each time Defendants misrepresented the substance of the turnover order, they committed an act of mail or wire fraud. Defendants made this allegedly false representation in numerous letters to numerous insurance companies that were believed to be debtors of Plaintiff WPS.

Travelers Insurance Company (Travelers) was one of the insurance companies that received a letter from Defendants. Travelers interplead the contested funds in State court. In that action, WPS did not participate and a default judgment was entered against it. On July 8, 2002, WPS's motion to set aside default and default judgment was denied.[1]

In addition, Plaintiffs contend that there were multiple victims of Defendants' alleged fraudulent acts. The alleged victims of the RICO violation include Plaintiff WPS; Plaintiffs Stephen Turner, Susana Turner and their children David, Daniel and Deborah; the insurance companies who received the allegedly fraudulent communications; Plaintiff Stephen Turner's financial advisor, Robert Matthews; the Contra Costa Superior Court; and American Paramedical Services (APS) .

---

[1] The parties request that the Court take judicial notice of the interpleader action, WPS's motion to set aside default, and the State court's denial of that motion. The requests for judicial notice properly encompass adjudicative facts within the meaning of Federal Rule of Evidence 201. These requests are, therefore, granted (Doc ## 51, 62, 65, 67).

LEGAL STANDARD

A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts which would entitle it to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Fidelity Fin. Corp. v. Fed. Home Loan Bank of S.F., 792 F.2d 1432, 1435 (9th Cir. 1986). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. See Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

Dismissal of a complaint can be based on either the lack of a cognizable legal theory or the lack of sufficient facts alleged under a cognizable legal theory. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

When granting a motion to dismiss, a court is generally required to grant a plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment would be futile, a court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990). Leave to amend should be liberally granted, but an amended complaint

cannot allege facts inconsistent with the challenged pleading. See id. at 296-97.

A district court has broad discretion to grant or deny leave to amend, particularly where the court has already given a plaintiff one or more opportunities to amend his complaint to allege all claims. Mir v. Fosburg, 646 F.2d 342, 347 (9th Cir. 1980); see also McGlinchy v. Shell Chem. Co., 845 F.2d 802, 809-10 (9th Cir. 1988) ("[r]epeated failure to cure deficiencies by amendments previously allowed is another valid reason for a district court to deny a party leave to amend").

DISCUSSION

A. RICO

Civil liability under RICO is premised on violations of one or more of the provisions of section 1962. The provisions at issue here are section 1962(c), which prohibits a person from participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity, and section 1962(d), which prohibits a person from conspiring to violate the other provisions of RICO. The issue raised in this motion is whether the acts alleged by Plaintiffs constitute a "pattern of racketeering activity."

In H.J. Inc. v. N.W. Bell Tel. Co., the Supreme Court held that to show a pattern of racketeering activity, a RICO plaintiff must "show that the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity." 492 U.S. 229, 239 (1989). The "relatedness" requirement is met if the predicate acts "have the same or similar purposes, results, participants, victims, or methods of commission." Id. at 240. Defendants do not

dispute that the alleged predicate acts are related in that they had the same purposes, participants and victims.

The "continuity" requirement is met when the "conduct poses a threat of continued criminal activity such as when the illegal conduct is 'a regular way of conducting a defendant's ongoing legitimate business.'" Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1535 (9th Cir. 1992) (citing H.J. Inc., 492 U.S. at 243). "Isolated or sporadic" acts generally do not satisfy the continuity requirement, see Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393 (9th Cir. 1986), while "ongoing schemes, numerous victims and a risk of continuing illegal activity" suggest that the predicate acts satisfy this requirement. Medallion Television, 833 F.2d at 1365; id. ("we prefer to frame the inquiry as whether the acts are isolated or sporadic, on the one hand, or whether they indicate a threat of continuing activity on the other").

Plaintiffs do not contend that the enterprise, Defendant law firm Cook, Perkiss, & Lew, is conducted as a criminal enterprise. See Plaintiffs' RICO Statement ¶ 7 ("Plaintiffs believe that the racketeering activity is separate from the enterprise and that it has not merged with the enterprise."); id. ¶ 8 ("The usual activity of the enterprise is the honest practice of law."). Rather, Plaintiffs argue that they have satisfied the continuity requirement because they have alleged numerous fraudulent acts with multiple victims. According to Plaintiffs, these multiple acts directed at multiple victims show a threat of continuing criminal activity.

In support of this contention, Plaintiffs rely on Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466 (9th Cir. 1987). In Cal. Architectural, the plaintiffs were businesses and individuals who sold ceramic tile. The defendant was a manufacturer of ceramic tile. The

alleged predicate acts of fraud were representations by the defendant that it would stay in business and supply the plaintiffs with tile through March, 1994. In fact, the defendant had decided to close its business by the end of October, 1993. 818 F.2d at 1467. The defendant argued that the predicate acts did not satisfy the continuity requirement because they all related to a single criminal episode, the closing of the defendant's business. Id. at 1469. The court held that the plaintiffs had sufficiently alleged a pattern of racketeering activity because they alleged "multiple fraudulent sales to . . . multiple victims" over a period of five months. Id. Plaintiffs contend that under Cal. Architectural, they have adequately plead a RICO violation because they too have alleged multiple fraudulent acts against numerous victims.

Under Cal. Architectural, Plaintiffs need not plead multiple "criminal episodes" in order to state a RICO claim. However, where all of the alleged predicate acts are part of a single scheme, the plaintiffs must allege something that shows a threat of continuing criminal activity. In Cal. Architectural, the court held that multiple, separate fraudulent sales to separate plaintiffs over a five month period was sufficient. In subsequent cases, however, the Ninth Circuit has made clear that numerous predicate acts do not satisfy the continuity requirement if those acts were aimed at fulfilling a single, identifiable purpose.

In Medallion Television, for example, the plaintiff alleged that the defendants' multiple misrepresentations induced it to enter into a joint venture that ultimately failed. The plaintiff alleged that each misrepresentation made over the phone or through the mails was a predicate act for purposes of RICO. The court held that the numerous allegedly fraudulent acts did not satisfy the continuity requirement.

> All of SelecTV's assertions about the number of licensing agreements it had obtained were parts of its single effort to induce Medallion to form the joint venture in order to obtain the broadcast rights from the promoters. In essence, Medallion's allegations concern a single fraudulent inducement to enter a contract. Once the joint venture had acquired the broadcast rights, the fraud, if indeed it was a fraud, was complete.

833 F.2d at 1363-64.

Similarly, in Sever, the plaintiff brought suit against his former employers alleging that they had fired him, blacklisted him induced a subsequent employer to fire him after he wrote articles criticizing them and testified before Congress to their economic detriment. 978 F.2d at 1532. The plaintiff's RICO claim alleged the defendants engaged in a pattern of racketeering activity that damaged his ability to obtain employment. The lower court dismissed the plaintiff's fourth amended complaint for failure to state a claim under RICO, on grounds, inter alia, that he had failed to allege a pattern of racketeering. 978 F.2d at 1533. The Ninth Circuit affirmed, holding that the allegations did not satisfy the continuity requirement. The Ninth Circuit specifically noted that there was suggestion that the defendants would have harmed any other Congressional witnesses or that the alleged practices had become a regular way of conducting business. Id.

In this case, the sole alleged purpose of Defendants' conduct to redirect to Defendants sums owed to Plaintiff WPS in order to collect the outstanding judgment owed by Plaintiff Stephen Turner. There is no allegation of a continuing threat of unlawful activity that judgment is collected. See also Religious Technology Center Wollersheim, 971 F.2d 364,

366 (9th Cir. 1992) (because the goal of allegedly fraudulent activity was prosecution of State court tort "there was no threat of activity continuing beyond the conclusion that suit"). Consequently, the multiple predicate acts alleged by Plaintiffs do not satisfy RICO's continuity requirement.

Plaintiffs' contention that there were multiple victims of Defendants' fraudulent conduct does not alter this conclusion. Several cases have noted that the existence of multiple victims is one indication that the alleged conduct constitutes a threat of continued criminal activity. See Medallion Television, 833 F.2d at 1363 (finding continuity requirement not satisfied because "this case involved but a single alleged fraud with a single victim"); Sever, 978 F.2d at 1536. The existence of multiple victims is probative of the threat of continued criminal activity because it is fair to infer that a defendant who has defrauded numerous individuals is likely to continue its fraudulent activity. In this case, however, Plaintiffs are not entitled to this inference because the additional victims they identify are closely connected to one another and all were allegedly injured by the single course of allegedly fraudulent conduct discussed above.

Plaintiffs Stephen and Susana Turner, for example, are husband and wife and employees of Plaintiff WPS. Plaintiffs concede that Stephen Turner played a role in creating the Golden Gate Trust, which is the nominal owner of WPS. Second Amended Complaint ¶ 48. Plaintiffs Stephen and Susana Turner allege that Defendants' allegedly fraudulent acts injured them because those acts damaged Plaintiff WPS's ability to pay their salaries. Similarly, Plaintiffs David, Daniel and Deborah Turner are Plaintiffs Stephen and Susana Turner's children and they are the residuary beneficiaries of the trust which owns Plaintiff WPS. The children allege that they were victims of Defendants' allegedly fraudulent acts in

that any damage suffered by Plaintiff WPS will be ultimately borne by them. These Plaintiffs do not allege that Defendants separately committed acts of fraud that injured them. Rather, they contend that the same predicate acts that injured Plaintiff WPS also injured them. These allegations do not support Plaintiffs' contention that there is a continuing risk of illegal activity by Defendants.[2]

---

[2] In fact, because the Turner Plaintiffs' alleged injuries are indirect, they do not have standing to bring a RICO claim.

The Ninth Circuit has articulated a three-factor test to determine if an injury is "too remote" to allow recovery under RICO. Assoc. Wash. Pub. Hosp. Dists. v. Philip Morris, Inc., 241 F.3d 696, 701 Cir. 2001). First, the Court must determine "whether there are more direct victims of the alleged wrongful conduct who can be counted vindicate the law." Id. In this case, Plaintiff WPS is the direct victim of the allegedly wrongful conduct in that Defendants attemt to convince WPS's debtors to pay monies owed to WPS to Defendants WPS's role in this litigation attests to its ability to vindicate rights. Second, the Court must assess "whether it will be difficult ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct." Id. This factor also favors a finding that the Turner Defendants lack standing. The value of Plaintiffs David, Daniel and Deborah Turner's residual interest in the trust owns Plaintiff WPS is uncertain. The decrease in that uncertainty as a result of Defendants' allegedly wrongful conduct is, at the difficult to ascertain and, more likely, entirely speculative. Likewise, it is difficult to ascertain what portion of Plaintiffs Stephen Turner and Susana Turner's lost salary is attributable to allegedly wrongful conduct of Defendants. The final factor that the Court must apply is "whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries. Id. Such would be the case here. If, for example, after trial on the merits, it is determined that Defendants wrongfully diverted a certain sum from Plaintiff WPS, it is not clear how much of that wrongfully diverted sum would go to Plaintiffs Stephen Turner and Susana Turner for their lost wages,

Plaintiffs also contend that the insurance companies that received letters from Defendants were victims of Defendants' allegedly wrongful conduct. The insurance companies are alleged to be victims of this fraud because, upon receiving letters from Defendants, "these companies didn't know what to do." Plaintiffs RICO Statement ¶ 4(e)(5). The Ninth Circuit addressed a similar argument in Medallion Television. As noted above, that case involved the plaintiff's allegation that it was fraudulently induced into an unsuccessful joint venture. The joint venture secured rights to telecast a professional boxing match. The plaintiff argued that the fight promoter and the television stations that broadcast the fight were also victims. The Court rejected this contention, holding "the stations were not victims because they got everything they had bargained for--the telecast of the fight." Medallion Television, 833 F.2d at 1364 n.5. The fight promoter likewise "got what it bargained for: it sold the telecast rights." Id.

Similarly, in this case, the insurance companies owed certain sums to Plaintiff WPS. They paid those sums. There is no evidence that they were defrauded of sums they did not owe or failed to receive the services for which they paid. Therefore, the insurance companies are not victims of Defendants' allegedly fraudulent acts.[3]

---

how much to Plaintiffs David, Daniel and Deborah Turner for their residuary interest in the trust that owns Plaintiff WPS and how much would go to the direct victim of the fraud, Plaintiff WPS.

Consequently, even if Plaintiff WPS had stated a RICO claim against Defendants, the Turner Plaintiffs would have no standing to pursue that claim.

[3] According to the Second Amended Complaint, Defendants contacted APS, a company run by Plaintiff Stephen Turner's sister and attempted to convince the manager of APS to turn over sums

Plaintiffs also allege that Plaintiff Stephen Turner's financial advisor Robert Matthews and the Contra Costa County Superior Court were also victims of Defendants' illegal acts.

Apparently, Matthews was briefly named as a defendant in a wrongful conveyance action brought by Defendants in Contra Costa Superior Court. Matthews "provided financial advice to [Plaintiff Stephen] Turner in connection with the creation of the Golden Gate Trust." Second Amended Complaint ¶ 48. Plaintiffs state that Matthews is a victim of Defendants' unlawful activity because "Cook's theory in bringing Mr. Matthews in the case was that Matthews was supposedly a trustee to the Golden Gate Trust, which is patently false, and yet another example of Cook trying to use wire fraud, mail fraud, and obstruction of justice as a means toward its goal of securing payment on the judgment debt." Id. ¶ 48. In order for Matthews to be a victim of Defendants' unlawful conduct, he must suffer some detriment. Plaintiffs have failed to allege that Mr. Matthews was harmed by his brief inclusion as a defendant in the fraudulent conveyance action.

The contention that the Contra Costa Superior Court was the victim of fraud similarly lacks merit. Plaintiffs argue that the Contra Costa Superior Court was injured when Defendants brought an unfounded contempt proceeding against Plaintiff Stephen Turner. Suffice it to say that courts are frequently called upon to adjudicate actions that

---

owed to Plaintiff Stephen Turner. The alleged damage to this victim is that "it made dealings with [Plaintiff Stephen] Turner much more difficult." See Amended Complaint ¶ 47. APS, like the insurance companies that received the allegedly false letters, was not a victim of wrongful conduct by Defendants.

objectively lack merit. The bringing of such an action does not constitute a predicate act of fraud for RICO purposes.

Lastly, Plaintiff WPS is an alleged victim of Defendants' allegedly fraudulent conduct. Plaintiff WPS was allegedly victimized when parties which owed it money were fraudulently induced to turn money over to Defendants. One of those parties, Travelers, interplead the disputed funds in State court. In that action, the Contra Cota County Superior Court granted default judgment to Defendants Yeo and Martini, thereby holding that the turnover order entitled Defendants monies owed to Plaintiff WPS. Defendants argue that this judgment collaterally estops Plaintiff WPS from arguing that the letters sent third party insurance companies were fraudulent.

Collateral estoppel applies where 1) the issue decided in the prior action is identical to the issue presented in the second action; 2) there was a final judgment on the merits; and 3) the party against whom estoppel is asserted was a party to the prior adjudication. Moore, 186 B.R. 962, 968 (Bkrtcy. N.D. Cal. 1995). Plaintiff WPS contends that it was never served in the interpleader action, did participate in that action, and, therefore, is not estopped from arguing here that Defendants' assertions in letters to third parties were false. However, on July 8, 2002, Plaintiff WPS moved to set the default judgment. That motion was denied by the Contra Costa Superior Court. Consequently, the State court has already determined that the letters mailed to Plaintiff WPS's debtors accurately informed them of the content of the turnover order and, pursuant to that order properly required them to pay to Defendants sums owed to Plaintiff. The final judgment of the State court involving the same parties issues precludes Plaintiff WPS from contending in this Court that Defendants' letters to third party debtors were fraudulent.

Plaintiffs' conclusory allegations that Defendants' fraudulent conduct had numerous victims are not accepted as true. McGlinchy, 845 F.2d at 810 ("conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim"). The allegations in the Second Amended Complaint indicate that Defendants' alleged acts of fraud had the sole purpose of collecting on the judgment against Stephen Turner. As was the case in Medallion Television and Sever, there is nothing in these acts to suggest Defendants would continue their allegedly criminal activity after the judgment was collected. Without such allegations, Plaintiffs have failed to allege facts that satisfy the continuity requirement of a RICO claim.

In addition, the Second Amended Complaint fails to allege facts that suggest there were multiple victims of the alleged fraud. The injuries alleged by Plaintiffs Stephen, Susana, David, Daniel and Deborah Turner are indirect and speculative. Alleged victims Robert Matthews, APS, and the Contra Costa County Superior Court suffered no legally cognizable injury. Finally, because a State court has already determined that the letters sent by Defendants to Plaintiff WPS's debtors accurately reflected the content of the turnover order, Plaintiff WPS is collaterally estopped from contending in this action that those letters were fraudulent.

B. Invasion of Privacy

Plaintiffs also bring a claim for relief pursuant to State law. Title 28 U.S.C. § 1367(a) gives this Court supplemental jurisdiction over this claim. Pursuant to 28 U.S.C. § 1367(c), however, the Court may decline to exercise its jurisdiction if, as is the case here, "the district court has dismissed all claims over which it has original jurisdiction." The ultimate question for the Court is whether accepting or declining jurisdiction

"best accomodate[s] the values of economy convenience, fairness and comity." Executive Software North America, Inc. v. United States District Court, 24 F.3d 1545, 1556 (9th Cir. 1994) (quoting Carnegie-Mellon v. Cohill, 484 U.S. 343, 351 (1988)). "In the usual case in which all federal-law claims are eliminated before trial, the balance of factors will point toward declining to exercise jurisdiction over the remaining state-law claims." Acri v. Varian Assoc., Inc., 114 F.3d 999, 1001 (9th Cir. 1997) (en banc) (quoting Carnegie-Mellon, 484 U.S. at 350 n.7).

There are no factors that suggest this Court is best suited to adjudicate the invasion of privacy claim. The State law claim is based on separate facts and a separate legal theory from the RICO claim addressed here. In addition, the Contra Costa Superior Court is dealing with these same parties in ongoing litigation in State court. The Court, therefore, exercises its discretion to decline jurisdiction pursuant to 28 U.S.C. § 1367(c) .

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss Plaintiffs' Second Amended Complaint is granted (Docket # 50). Plaintiffs' RICO claim is dismissed on the merits and without leave to amend. Plaintiffs' State law claim for invasion of privacy is dismissed without prejudice to re-filing in State court. Judgment shall enter accordingly. Defendants shall recover their costs from Plaintiffs. The clerk shall close the file.

Dated: 8/28/02

/s/ CLAUDIA WILKEN
CLAUDIA WILKEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 01-3884 CW

[Filed August 28, 2002]

STEPHEN TURNER, M.D., SUSANA TURNER, on behalf of themselves and as Guardian ad Litem for minor children DAVID TURNER, DANIEL TURNER, DEBORAH TURNER, and WESTERN PARAMEDICAL SERVICES, LLC, Plaintiffs,	)
v.	)
DAVID J. COOK, ESQ., COOK, PERKISS & LEW, a professional law corporation, AH BENG YEO and E.A. MARTINI, and DOES 1 THROUGH X AND EACH OF THEM INCLUSIVE, Defendants.	)

JUDGMENT

For the reasons as set forth in this Court's Order Granting Defendants' Motion to Dismiss,

IT IS HEREBY ORDERED AND ADJUDGED:

That Plaintiffs Stephen, Susana, David, Daniel, and Deborah Turner and Plaintiff Western Paramedical Services, LLC take nothing and that Plaintiffs' claim pursuant to 18

U.S.C. § 1961 be dismissed on the merits. Plaintiffs' claim for invasion of privacy, brought pursuant to State law, is dismissed without prejudice to re-filing in State court. Defendants shall recover their costs from Plaintiffs.

Dated: 8/28/02

/s/ CLAUDIA WILKEN
CLAUDIA WILKEN
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 01-3884 CW

[Filed March 22, 2002]

STEPHEN TURNER, M.D., SUSANA TURNER, on behalf of themselves and as Guardian ad Litem for minor children DAVID TURNER, DANIEL TURNER, DEBORAH TURNER, and WESTERN PARAMEDICAL SERVICES, LLC,
Plaintiffs,

v.

DAVID J. COOK, ESQ., COOK, PERKISS & LEW, a professional law corporation, AH BENG YEO and E.A. MARTINI, and DOES 1 THROUGH X AND EACH OF THEM INCLUSIVE,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss Plaintiffs' five causes of action for failure to state a claim on which relief can be

granted. Plaintiffs oppose the motion. The matter was heard on March 15, 2002. Having considered all of the papers filed by the parties and oral argument on the motion, the Court GRANTS the motion (Docket #25).

BACKGROUND

On August 21, 1998 Defendants Yeo and Martini obtained a judgment against Plaintiff Stephen Turner in excess of $1,000,000. Complaint, Ex. A. The judgment resulted from a jury verdict after trial in which Plaintiff Stephen Turner was found to have committed "various business interference torts" against Defendants Yeo and Martini. Complaint ¶ 12. Defendants Yeo and Martini hired Defendant Cook and his law firm Cook, Perkiss & Lew to assist in collection of the judgment. Plaintiffs allege that the means used by Defendants to collect on the judgment violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 et. seq.,[1] the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq., and the California Unfair Business Practices Act, Cal. Bus. & Prof. Code § 17200 et. seq. Plaintiffs also allege that Defendants' collection activities were undertaken with the intent to inflict emotional distress, and constituted an invasion of privacy.[2]

The alleged conduct that forms the basis of these claims is as follows.

---

[1] Plaintiff Western Paramedical Services, LLC does not join in this cause of action. Complaint ¶ 17.

[2] The cause of action for invasion of privacy is only alleged against Defendants Cook and Cook, Perkiss, & Lew. Complaint ¶ 62.

On October 29, 1999, Defendants Yeo and Martini, represented by Defendant Cook, Perkiss & Lew, filed a complaint against Plaintiff Stephen Turner alleging that Turner had fraudulently conveyed his real and personal property with the intent to prevent Yeo and Martini from collecting the money owed on the prior judgment. Complaint, Ex. I.

In their complaint, Yeo and Martini alleged that Plaintiff Stephen Turner previously had been convicted of harassing Yeo and Martini in violation of California Penal Code § 415. Id. at 3. Although the complaint sought to set aside the conveyance of a property located in Alameda, California, the complaint was filed in the Superior Court of California, County of Contra Costa. Id. at 1.

Plaintiffs allege that Defendants' court filings in the Contra Costa fraudulent conveyance action contained "false, deceptive and improper statements." Specifically, Plaintiff Stephen Turner objects to references to his prior misdemeanor criminal conviction and objects to a disparaging characterization of his family trust suggesting it was created to assist him to hide his assets. Complaint ¶ 41.

Plaintiffs allege that, in addition to filing the fraudulent conveyance action, Defendants sent out hundreds of letters informing third parties that Defendants Yeo and Martini obtained a judgment and an order of assignment against Plaintiff Stephen Turner. Complaint, Ex. B. The letters stated that "any monies which you may owe to Dr. Turner, or any designee, nominee, or other named entity, now constitute the property of [Yeo and Martini]." Id. Plaintiffs allege that these letters falsely stated that the assignment order applied to Western Paramedical Services (WPS) when, in fact, the judgment against Plaintiff Stephen Turner may not be

recouped from Plaintiff WPS. Complaint ¶¶ 24, 27. Plaintiffs allege that Defendants made these same false representations in telephone conversations with third parties who do business with Plaintiff Stephen Turner and/or Plaintiff WPS. Id. ¶ 31.

Plaintiffs also allege that Defendants engaged in other conduct to "harass, oppress or abuse" them. This conduct included: serving excessive copies of court papers on Plaintiffs, Complaint ¶ 38; improperly serving Plaintiffs with documents intended for other parties, Complaint ¶ 39; making false statements in an August, 2001 court filing regarding the sale of Plaintiffs' residence, Complaint ¶ 43; stating to Plaintiff Stephen Turner, "You dirty Jew, I'll take everything away from you." Complaint ¶ 37.

LEGAL STANDARD

A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts which would entitle it to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Fidelity Fin. Corp. v. Fed. Home Loan Bank of S.F., 792 F.2d 1432, 1435 (9th Cir. 1986), cert. denied, 479 U.S. 1064 (1987). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. See Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987), cert. denied, 484 U.S. 944 (1987).

Dismissal of a complaint can be based on either the lack of a cognizable legal theory or the lack of sufficient facts alleged under a cognizable legal theory. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

When granting a motion to dismiss, a court is generally required to grant a plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. See Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment would be futile, a court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990). Leave to amend should be liberally granted, but an amended complaint cannot allege facts inconsistent with the challenged pleading. See id. at 296-97.

DISCUSSION

A. FDCPA, 15 U.S.C. § 1692

Plaintiffs contend that Defendants' efforts to collect the judgment owed by Plaintiff Stephen Turner exceeded the limitations imposed by the FDCPA. They allege that Defendants made "false deceptive or misleading representations" and used "unfair or unconscionable means to collect or attempt to collect any debt" in violation of 15 U.S.C. § 1692e, 1692f. Complaint ¶¶ 32, 35.

The prohibitions of sections 1692e and 1692f do not apply to all collection procedures. Rather, the FDCPA regulates the collection of a specific type of debt defined in the statute. The FDCPA defines a "debt" as "any obligation or alleged

obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family or household purposes . . . ." 15 U.S.C. § 1692a(5). As an initial matter, therefore, the Court must determine whether Plaintiff Stephen Turner's obligation to Defendants is a "debt" within the meaning of the statute. If not, the prohibitions of the FDCPA do not apply to this action. Slenk v. Transworld Systems, Inc., 236 F.3d 1072, 1075 (9th Cir. 2001) (threshold question in suit under FDCPA is whether the dispute involves a "consumer debt as that phrase is defined by the FDCPA").

In order to qualify as a debt within the meaning of the statute, the obligation must arise "out of a transaction" and the obligation must be incurred "primarily for personal, family, or household purposes." Plaintiffs concede that the tort judgment entered against Plaintiff Stephen Turner is not a "debt" within the meaning of the act. See Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367 (11th Cir. 1998) (obligation arising from tort is not a transaction and tortfeasor is not a consumer within the meaning of the FDCPA) .

Plaintiffs argue, however, that the action to set aside the fraudulent conveyance of Stephen Turner's property falls within the FDCPA because it is an action to recover a personal residence. This fact does not convert Defendants' efforts to collect a tort judgment into an effort to collect a consumer debt. There is but one "debt" at issue here: a judgment in excess of $1,000,000 owed by Plaintiff Stephen Turner to Defendants Yeo and Martini. Defendants' actions were an effort to effectuate that judgment. The judgment, as noted, is not a consumer debt such that the proscriptions of the FDCPA would apply.

Because the FDCPA does not apply to actions taken to collect a tort judgment and because no additional allegations can convert the tort judgment at issue here into a consumer debt to which the FDCPA would apply, Plaintiffs' first claim for relief for violations of the Fair Debt Collection Practices Act is dismissed without leave to amend.

B. RICO, 18 U.S.C. § 1961

To state a claim under RICO, Plaintiffs must allege a "pattern or racketeering activity." 18 U.S.C. § 1961. A "pattern or racketeering activity" is a term of art meaning at least two acts of racketeering activity (predicate acts) within ten years of each other.[3] Id. at § 1961(5). The plaintiff must allege that these predicate acts related (relatedness requirement), "and that they amount to or pose threat of continued criminal activity" (continuity requirement). Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989) (emphasis in original).

A plaintiff may satisfy the continuity requirement by alleging either "closed-ended" or "open-ended" continuity. Closed-ended continuity involves "a series of related predicates extending over substantial period of time." H.J., 492 U.S. at 242; see also Reli Technology Center v. Wollersheim, 971 F.2d 364, 366-67 (9th Cir.) Open-ended

---

[3] RICO defines racketeering activity as "any act or threat involving" specified State law crimes, any "act" indictable under various specified federal statutes, and certain federal "offenses" ("predicate acts"). 18 U.S.C. § 1961(1). Predicate acts include, inter alia, mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. 1343, and "any offense involving . . . fraud in the sale of securities . . . " 18 U.S.C. § 1961(1)(B) & (D).

continuity involves "a specific threat of repetition extending indefinitely into the future," or predicate acts that "are part of an ongoing entity's regular way of doing business." H.J.,U.S. at 242; Ticor Title Ins. Co. v. Florida, 937 F.2d 447, 450 (9th Cir. 1991).

Where the predicate acts were designed to bring about a single event or injury to a single plaintiff, continuity is not sufficiently plead. See, e.g., Medallion Television Enterprises, Inc. v. Selec California, Inc., 833 F.2d 1360 (9th Cir. 1987), cert. denied, 492 917 (1989) (two predicate acts aimed at fraudulent inducement to a contract); Religious Technology Center v. Wollersheim, 971 F.2d (9th Cir. 1992) (only goal of defendants was successful prosecution their State lawsuit); Sever v. Alaska Pulp Corp., 978 F.2d 1529 (9th Cir. 1992) (defendants' acts served single purpose of impoverishing plaintiff).

In Sever, the plaintiff brought suit against his former employer alleging that the defendants had fired him, blacklisted him, and induced a subsequent employer to fire him after he wrote articles criticizing the defendants and testified before Congress to their economic detriment. The plaintiff's RICO claim alleged that the defendants engaged in a pattern of racketeering activity that damaged his ability to obtain employment. The lower court dismissed the plaintiff's fourth amended complaint for failure to state a claim. RICO, on grounds, inter alia, that he had failed to allege a pattern racketeering. 978 F.2d at 1533. The Ninth Circuit affirmed, holding that the allegations did not satisfy the continuity requirement s in H.J. The Ninth Circuit specifically noted that there was no suggestion that the defendants would have harmed any other Congressional witnesses or that the alleged practices had become regular way of conducting business. Id.

Similarly, in this case, Plaintiffs allege that "the many letters and follow up telephone calls and faxes, constitute a pattern of racketeering conduct." Complaint ¶ 56. However, the sole allege purpose of this conduct is to redirect to Defendants sums owed to Plaintiff WPS in order to collect the outstanding judgment owed by Plaintiff Stephen Turner. Id. ¶ 52. There is no allegation of a continuing threat of unlawful activity once that judgment is collected. See Religious Technology Center, 971 F.2d at 366 (because the goal allegedly fraudulent activity was prosecution of State court tort "there was no threat of activity continuing beyond the conclusion that suit"); Medallion Television Enter., 833 F.2d at 1364 (where was a joint venture to obtain broadcast rights, once the rights were obtained the threat ended).

In fact, just the opposite is alleged. Plaintiffs specifically note that the activity complained of was solely directed towards collecting the judgment owed by Plaintiff Stephen Turner. See Complaint ¶ 57 (alleged racketeering activities were "motivated by desire to collect on a judgment against Stephen Turner in favor of and Martini"). Consequently, the "continuity requirement" necessary state a claim under RICO is not satisfied.[4]

---

[4] In addition, for separate reasons, Plaintiffs have not stated a claim against Defendant Cook, Perkiss, & Lew under RICO. "For the purposes of section 1962, RICO plaintiffs must allege a defendant--the "person" or "persons"--who is distinct from the "enterprise" whose business the defendant is conducting." Sever, 978 F.2d at 1533. Plaintiffs specifically plead that Defendant Cook, Perkiss, & Lew is the "enterprise that carried on these predicate acts." Complaint ¶ 57. Because one entity cannot be both the corrupt enterprise and the persons conducting that enterprise, the RICO claim against Defendant Cook, Perkiss & Lew must be dismissed.

Because Plaintiffs have not alleged conduct that satisfies the continuity requirement for a RICO claim, that claim is dismissed with leave to amend. If Plaintiffs choose to file an Amended Complaint alleging a RICO violation, Plaintiffs, concurrent with their Amended Complaint, are ordered to file a RICO case statement in the format provided in the attached Order.

C. State Law Claims

Plaintiffs also bring three causes of action pursuant to State law. Title 28 U.S.C. § 1367(a) gives this Court supplemental jurisdiction over such claims. Defendants contend that the conduct that forms the basis of Plaintiffs' complaint is privileged pursuant to California Civil Code § 47(b)(2) (litigation privilege) and, therefore, cannot form the basis of liability for either the common law or the statutory causes of action alleged.

Moreover, Plaintiffs Stephen Turner, Susanna Turner, and their minor children have no standing to pursue a RICO claim against Defendants. Title 18 U.S.C. § 1964 confers standing on "any person injured in his business or property" by reason of a RICO violation. According to the complaint, the allegedly fraudulent acts resulted in the misdirection to Defendants of monies owed to Plaintiff WPS. Plaintiff Stephen Turner declares that his only connection to Plaintiff WPS is as an employee and former independent contractor. Declaration of Stephen Turner ¶ 6. Plaintiff Susanna Turner declares that she is a manager for Plaintiff WPS. Declaration of Susanna Turner ¶ 1. Plaintiffs contend that they have suffered a cognizable injury because "had these funds been paid over to Western Paramedical Services, LLC, they would have become available to pay wages and salaries over to Plaintiffs." Complaint ¶ 58. This speculative, indirect injury is not cognizable as a RICO injury.

In O'Keefe v. Kompa, 100 Cal. Rptr. 2d 602 (Ct. App. 2000), the California Court of Appeal applied the litigation privilege in a situation analogous to the one now before the Court. In that case, the plaintiff had lost a prior suit against defendants and been ordered to pay the defendants attorneys' fees. In an effort to collect the attorneys' fees, the defendants filed a levy on the plaintiff's bank account and engaged in other collection activities. The plaintiff then sued the defendants based on these collection efforts.

The court applied a four part test to see if the conduct at issue was subject to the litigation privilege. "To be privileged a statement must (1) be made in a judicial proceeding, (2) by litigants or other authorized participants, (3) aim to achieve the litigation's objects, and (4) have some logical connection or relation to the proceeding." Id. at 604-05 (citing Silberg v. Anderson, 266 Cal. Rptr. 638 (1990)). "Further, [the litigation privilege] applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved." Silberg, 266 Cal. Rptr. at 642 (citations omitted). In O'Keefe, the court concluded that section 47(b)(2) applied to the defendants' collection activities and dismissed the complaint.

Plaintiffs here raise three arguments as to why the conduct and statements of Defendants do not fall within the litigation privilege. First, Plaintiffs argue that the statements included by Defendants in letters to third parties were knowingly false. Plaintiffs contend that the making of knowingly false representations in this context amounts to obstruction of justice and attorney deceit and that such conduct is not subject to the litigation privilege. In support of this proposition, Plaintiffs rely on Carney v. Rotkin, Schmerin & McIntyre,

206 Cal. App. 3d 1513 (1988).[5] In that case, the court held that an attorney's false statement to an opposing party that a bench warrant had been issued for her arrest was not privileged because the statement as alleged was proscribed by the Code of Professional Conduct. The court concluded that this unethical conduct was not intended to achieve the litigation's objectives and therefore did not satisfy the third criteria for a privileged statement. Id. at 1520.

However, subsequent to the California Court of Appeals decision in Carney, the California Supreme Court decided Silberg, supra. In Silberg, the court reaffirmed that the litigation privilege should be construed broadly to protect statements associated with an ongoing judicial proceeding. The court specifically noted that attorney liability for fraudulent communications, perjured testimony, and abuse of process were all precluded by the litigation privilege. 266 Cal. Rptr. at 646; O'Keefe, 100 Cal. Rptr. 2d at 604-05. Each of these torts requires allegations of unethical or criminal conduct, yet the court found that such allegations were not a bar to satisfaction of the four part test noted above. Therefore, the litigation privilege applies equally to malicious or fraudulent conduct and statements. Plaintiffs' argument that the litigation privilege does not apply where unethical conduct is alleged is therefore contrary to controlling authority from the California Supreme Court and must be rejected.

Plaintiffs next argue that statements to third parties not involved in the litigation are not privileged. Plaintiffs rely on

---

[5] Plaintiffs also rely on Kinnamon v. Staitman & Snyder, 66 Cal. App. 3d 893 (1977) and Barbary Coast Furniture v. Sjolie, 167 Cal. App. 3d 319 (1985). Both of these cases were explicitly overruled by the California Supreme Court. See Silberg, 266 Cal. Rptr. at 646.

Susan A. v. County of Sonoma, 3 Cal. Rptr. 2d 27 (Ct. App. 1991) for this proposition. The Susan A. court held that statements to the press were not privileged because the communications were made "to persons in no way connected with the proceeding." 3 Cal. Rptr. at 31. In O'Keefe, by contrast, the court held that levying on a bank account was "clearly privileged" because that effort was "an extension of [the] judicial process." 100 Cal. Rptr. 2d at 605. In this case, the letters sent to third parties notifying them of the order of assignment against Stephen Turner were privileged because those letters were an attempt to enforce a prior judgment and, therefore, an extension of that process. "We conclude that defendants' actions were logically and legally related to the realization of a litigation objective--that is, collection of a judgment." Id.

Lastly, Plaintiffs argue that Defendants acted outside the litigation privilege when they attached a police report involving Plaintiff Stephen Turner to their fraudulent conveyance complaint. Plaintiffs rely on Ngyen v. Proton Technology Corp., 81 Cal. Rptr. 2d 392 (Ct. App. 1999), where the California Court of Appeal held that a demand letter's reference to appellant's criminal record was outside the litigation privilege. In Ngyen, the court noted that the connection between appellant's criminal record and the substance of the instant litigation was "to be charitable about it, tenuous." 81 Cal. Rptr. 2d at 398. Here, however, Plaintiff Stephen Turner's criminal record is directly related to the action which resulted in the judgment against him and, consequently, relevant to the attempts to collect the judgment through the fraudulent conveyance action.

The parties have a long and contentious history. Defendants contend that in 1995, prior to the civil litigation that resulted in the $1,000,000 judgment, Plaintiff Stephen

Turner harassed Defendants Yeo and Martini and that this harassment led to criminal proceedings against Dr. Turner. In their fraudulent conveyance complaint, Defendants included this fact to show the length and severity of the enmity between the parties, and Dr. Turner's motivation to hide his assets. The police report "had some logical connection to the proceeding" and is therefore privileged. O'Keefe, 100 Cal. Rptr. 2d at 605.

Because the conduct at issue is privileged, Defendants cannot be held liable on any of Plaintiffs' State law claims, including their third claim for relief for unfair business practices. See Cal. Bus. & Prof. Code § 17200; Rubin v. Green, 847 P.2d 1044, 1053 (Cal. 1993) ("To permit the same communicative acts [that are immune from civil tort liability pursuant to section 47(b)] to be the subject of an injunctive relief proceeding brought by this same plaintiff under the unfair competition statute undermines that immunity.").

The statement alleged to have been made by Defendant Cook to Plaintiff Stephen Turner ("you dirty jew, I'll take everything away from you") is not privileged. However, this statement is not relevant to either the invasion of privacy or the unfair competition claims, which are based on other alleged conduct. The statement, alone, is not sufficient to state a claim for intentional infliction of emotional distress. To state such a claim, the conduct at issue "must be so extreme as to exceed all bounds of that usually tolerated in a civilized society." Trerice v. Blue Cross of California, 257 Cal. Rptr. 338, 340 (Cal. 1989).

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is GRANTED (Docket #25). The debt in question here is not subject to the FDCPA, Plaintiffs have failed to plead predicate acts that may form the basis of a RICO cause of action, and Defendants are immune from liability on Plaintiffs' State law causes of action pursuant to California Civil Code § 47(b)(2).

The Court grants Plaintiffs leave to file an amended complaint in which, consistent with the requirements of Rule 11, they may state a RICO claim, alleging conduct by Defendants that satisfies RICO's continuity requirement.[6] If Plaintiffs file an amended complaint alleging a RICO claim, they must also file a RICO statement, as described in the Order Requiring Filing of Rico Statement filed today.

They may also re-allege their supplemental State law claims, if they can do so without alleging conduct that is subject to the litigation privilege. The amended complaint must be filed within thirty days of the date of this order. If it is not, this case will be dismissed without prejudice to refiling the State claims in State court.

Dated: 3/22/02

/s/ CLAUDIA WILKEN
CLAUDIA WILKEN
United States District Judge

---

[6] Plaintiffs object to Defendants' request for judicial notice of the judgment of the California Superior Court in The Travelers Ins. Co. v. Ah Beng Yeo and E.A. Martini, Western Paramedical Services, LLC., No. C00-04505. In granting Defendants' motion to dismiss, the Court did not rely on this document. Therefore, Plaintiffs' objection is denied as moot (Docket #33).